

*For
Messrs
Smith & West.*

IN THE
Supreme Court of Canada.

IN APPEAL FROM THE
Supreme Court of the North-West Territories.

BETWEEN

THOMSON, CODVILLE & Co.,

(DEFENDANTS) *Appellants.*

AND

JOHN QUIRK

(PLAINTIFF) *Respondent*

RESPONDENT'S FACTUM.

LONGHEED & McCARTHY,

Solicitors for Appellants.

McINTYRE, LEWIS & CODE,

Ottawa Agents.

SMITH & WEST,

Solicitors for Respondent.

STEWART & CHRYSLER,

Ottawa Agents.

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RESPONDENT'S FACTUM.

This is an appeal from the Supreme Court of the North West Territories.

The action was commenced in the Northern Alberta Judicial District by an order of Mr. Justice Roulean directing an issue to be tried in the Supreme Court 10 of the North West Territories in which John Quirk should be plaintiff and Thomson, Codville & Co., the now Appellants, defendants.

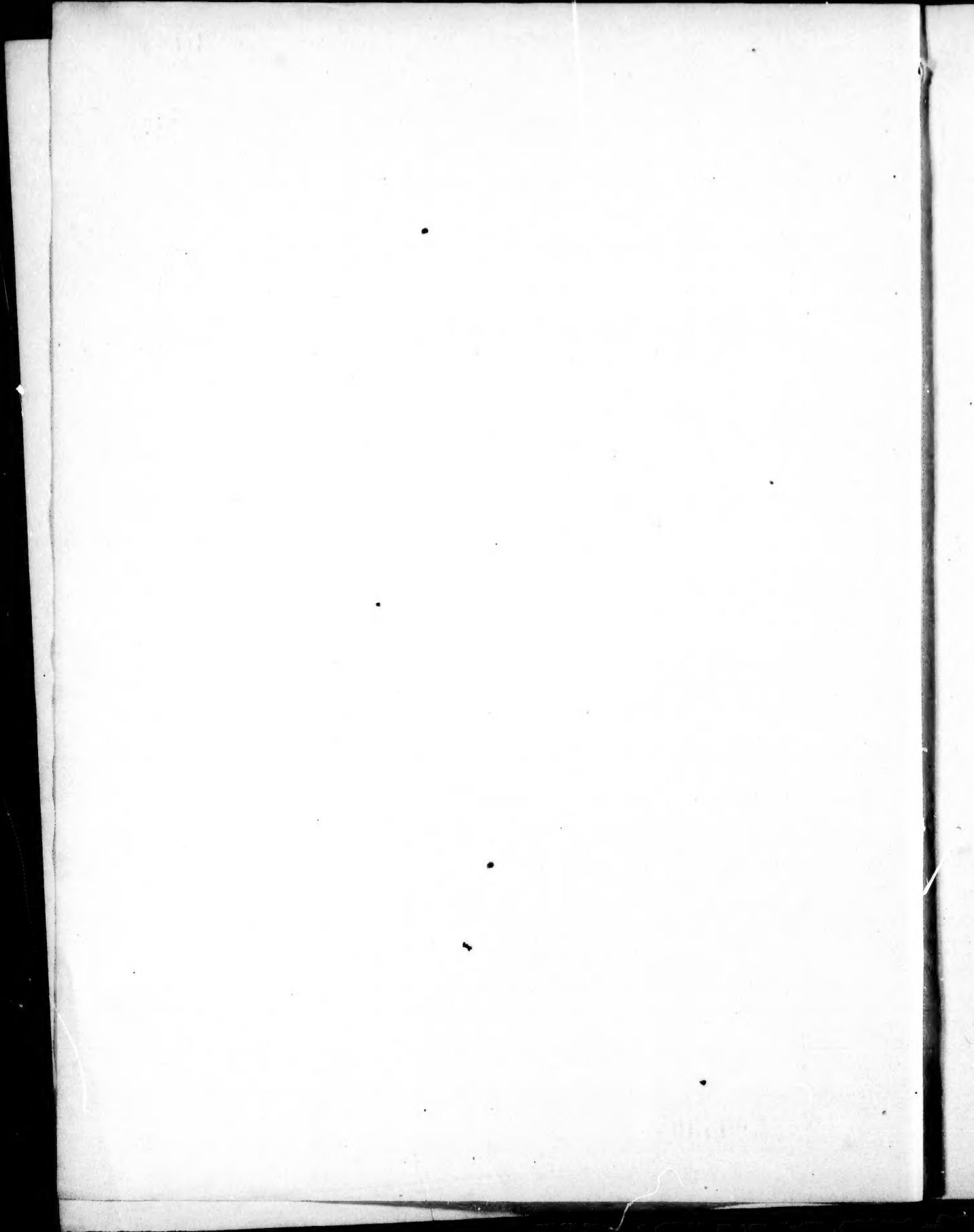
The question to be tried was whether at the time of seizure by the Sheriff the goods seized which are mentioned and described in a chattel mortgage made by Samuel Kirkpatrick and William E. Holmes to the claimant John Quirk were the property of the said Quirk as against Thomson, Codville & Co. the Claimants. The issue was tried at Calgary before Roulean. J.

At the trial the chattel mortgage was produced. The execution and the filing and renewal of the chattel mortgage were admitted. No other evidence was given.

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Two objections were taken to the right of the chattel mortgagee to recover.

- (1) Improper description of the goods.
- (2) That the chattel mortgage was not refiled.



The plaintiff's Counsel, while insisting upon the validity of the chattel mortgage, contended that the defendants were not in a position to take advantage of these objections because the Claimants had not proved a judgment or execution against Holmes and Kirkpatrick the mortgagors, and had therefore not shown themselves to be entitled to rely upon the provisions of the ordinance respecting chattel mortgages.

Judgment was given with costs against the plaintiff Quirk on the 6th day of September, 1888.

Quirk thereupon appealed to the Supreme Court of the North West Territories upon grounds which are disclosed in the notice of motion at page 5 of the 10 case.

Judgment was delivered on the 7th December, 1888, in favor of Quirk.

The present appeal is from that judgment and is brought on behalf of Thomson, Codville & Co. who are now appellants. The judgment is printed at page 6 of the case.

The chattel mortgagee at the trial objected and still objects that the defendants Thomson, Codville & Co. under the form of the interpleader issue in this case are obliged to establish that they had recovered a judgment and issued execution thereon, and that the cases relied upon by the appellants refer to a form of interpleader issue in which the judgment and execution of the creditor is recited in the issue. There is no such recital here. See *Chitty Forms*.

The defendants rely upon the two objections to the sufficiency of the chattel mortgage taken at the trial.

(1) The first is founded upon section 6 of Ordinance number 5 of 1881 which is in these words "All the instruments mentioned in this ordinance whether for the mortgage or sale of goods and chattels shall contain such sufficient and full description thereof that the same may be readily and easily known and distinguished."

The plaintiff contends that the description is abundantly clear and that the goods described in it may by such description be easily known and distinguished. The description is printed at page 4 of the Case.

See *McCall v. Wolf* 13 S. C. R. p. 130. *Harris v. Commercial Bank*, 16 U. C. R. 437-444. *Whiting v. Hovey* 14 S. C. R. 515.

(2) The second objection to the validity of the chattel mortgage is that the refiling was not a compliance with section 9 of Ordinance 5 of 1881.

"Every mortgage filed in pursuance of this Ordinance shall cease to be valid as against the creditors of the persons making the same *after the expiration of one year from the filing thereof*, unless a statement, &c. is again filed within thirty days next preceding the expiration of the said term of one year."

The first answer to this objection is that the date of seizure is not stated in the issue nor anywhere in the case and it does not appear whether the goods were seized before or after the expiration of one year from the filing of the original mortgage.

The second answer is that if renewal were necessary this chattel mortgage is proved to have been renewed within one year and the requirements of the section 10 were complied with. The section is in the same terms as the Ontario Act, Revised Statutes of Ontario chap. 125 sec. 11, and two Ontario Cases were cited and relied on.

Armstrong v. Ausman 11 U. C. R. 498.

Stewart v. Brock 19 C. L. J. 399.

In *Armstrong v. Ausman* the objection to the renewal was a different one and the point now in question did not really present itself for decision.

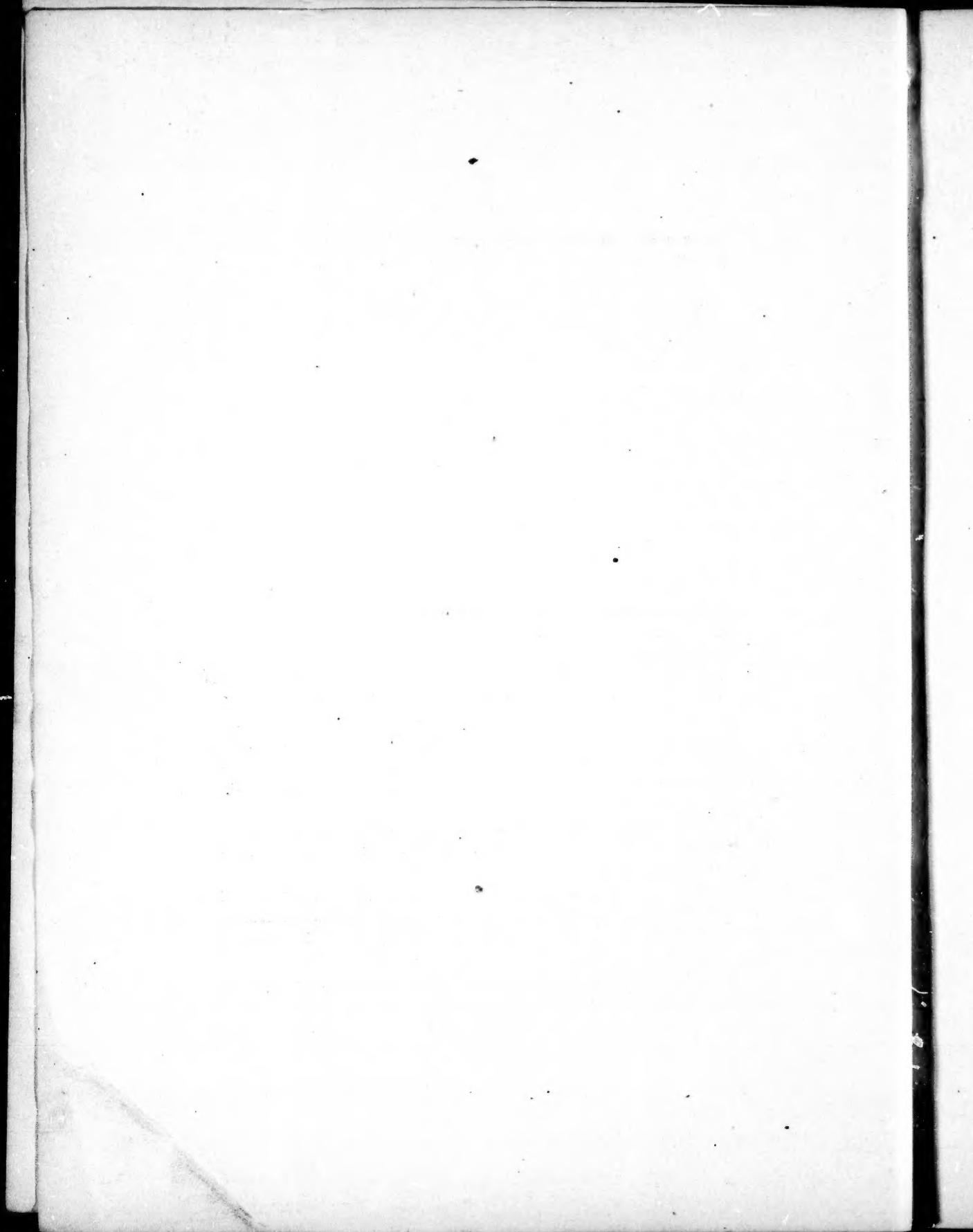
Stewart v. Brock was a judgment of a County Court Judge who followed out of deference the dictum expressed in *Armstrong v. Ausman*. Except these two cases the point is free from authority and the question is the general one as to the construction of a written document in regard to the computation of time

The words are very clear and precise—"after the expiration of one year from the filing thereof"—The chattel mortgage in question was filed on the 12th of August 1886 at ten minutes past four o'clock in the afternoon. The renewal was filed on the same day of the following year, the 12th of August, 1887, at forty nine minutes past eleven in the forenoon.

If the day of filing is excluded as it seems to be by the plain language of the section the mortgagee would have the whole of the same day in the following year to file the renewal.

If portions of a day are to be taken into account the year, from the hour and 30 minute of filing, would not expire until ten minutes past four on the 12th of August, 1887. In either case the renewal was filed in time and the chattel mortgage retained its validity.

Respondent relies upon the judgment of the Court appealed from at page 6, and the authorities there referred to.



See also *Lister v. Garland* 15 Vesey 248.

Dowling v. Foxall 1 Ball & B. 193. 196.

In computing time under the 15 & 16 Vic. cap. 5. sec. 2., avoiding letters patent upon failure in payment of stamp duties it was held that the day of the date should be excluded.

Williams v. Nash 5 Jur. N. S. 696.

28 L. J. Chy. 886.

28 Beaven 93.

Under the statute authorizing goods distrained to be replevied within five days next after the taking, the day of taking was held to be excluded. 10

Robinson v. Waddington 13 A. & E. 753.

Sutherland v. Buchanan 9 Gr. 135.

"There is abundance of authority that the day is to be construed exclusively wherever anything is to be done in a certain time after a given event or date." Per Osler J. in *Hanns v. Johnston* 3 O. R. 105.

The point there decided was that where a statute enacts that an action shall be commenced within six months after the fact was committed, in computing the time within which the action must be brought the day on which the fact was committed must be excluded so that an action commenced on the 5th June, for an act committed on 5th December, was in time. 20

Hanns v. Johnston 3, O. R. 100.

Earlier cases are referred to in that case and in *Edgar v. Magee*, 1 O. R. 295 per Hagarty, C. J.

The identity of the goods seized with those described in the chattel mortgage is stated as part of the question on the face of the issue. Whether rightly or wrongly the Sheriff did seize the goods described in the chattel mortgage and those goods are the goods in question.

The Plaintiff submits that his title to the goods has been clearly established, that the defendants have shown no right to dispute it, and that the judgment appealed from is right and should be affirmed. 30

F. H. CHRYSLER,
Counsel for Respondent.